(3)

No. 91-380

In The

Supreme Court of the United States

October Term, 1991

J. GERARD HOGAN, et al.,

Petitioners,

v.

MARK E. MUSOLF, et al.,

Respondents.

On Petition For Writ Of Certiorari To
The Supreme Court of Wisconsin

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Should certiorari be granted to consider reinstatement of a claim under 42 U.S.C. § 1983 which challenges the administration of a state taxing statute where:

(1) the challenged statute was amended by the state legislature within four months after the complaint was filed;

(2) the state court of last resort has specifically ruled that, under state law, the administrative agencies that review such claims are not powerless to grant tax refunds to these petitioners and such refund claims have not yet been finally resolved; and

(3) the challenged statute contains unique characteristics requiring further factual development in order to determine individual eligibility for refunds if refunds are required under 4 U.S.C. § 111 (1966).

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ADDITIONAL STATUTES INVOLVED

I. FEDERAL.

4 U.S.C. § 111 provides in relevant part as follows:

> The United States consents to the taxation of pay or compensation for personal service as an officer or employee of the United States . . . by a duly constituted taxing authority having jurisdiction, if the taxation does not discriminate against the officer or employee because of the source of the pay or compensation.

II. STATE.

Section 71.05, Wis. Stats. (1989-90), as amended by 1989 Wisconsin Act 31, section 1817m, provides in relevant part as follows:

> (1) EXEMPT AND EXCLUDABLE INCOME. There shall be exempt from taxation under this subchapter the following:
>
> (a) *Retirement systems.* All payments received from *the U.S. civil service retirement system, the U.S. military employe retirement system,* the employe's retirement system of the city of Milwaukee, Milwaukee county employes' retirement system, sheriff's annuity and benefit fund of Milwaukee county, police officer's annuity and benefit fund of Milwaukee, fire fighter's annuity and benefit fund of Milwaukee, or the public employe trust fund as successor to the Milwaukee public school teachers' annuity and retirement fund and to the Wisconsin state teachers retirement system, which are paid on the account of any person who was a member of the paying or predecessor system or fund as of December 31, 1963, or was retired from any of the systems or funds as of December 31, 1963, but such exemption shall not exclude from gross income tax sheltered annuity benefits.

SUPPLEMENTAL STATEMENT OF THE CASE

Plaintiffs commenced this action on April 17, 1989, and moved for a preliminary injunction on May 19, 1989, (R. 1, 4). Wisconsin resisted that motion on jurisdictional as well as policy grounds, specifically advising the trial court that legislation responding to the Court's decision in *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 109

S. Ct. 1500 (March 28, 1989) was already pending in the Legislature. Effective the day after its publication on August 8, 1989, 1989 Wisconsin Act 31, section 1817m, did in fact exempt for 1989 and subsequent tax years the pension income of all federal retirees who were members of their current retirement system or its predecessor as of December 31, 1963 ("pre-64 federal retirees") by inserting the emphasized language in sec. 71.05, Wis. Stats. (1989-90). The circuit court's June 13, 1989 bench decision finding jurisdiction under § 1983, granting the motion for preliminary injunctive relief and refusing to rule upon the individual defendants' qualified immunity defense was issued prior to the effective date of the statutory amendment.

Noting that the statute had been amended, the Wisconsin Supreme Court dismissed the § 1983 claim in its entirety, leaving the question of qualified immunity unresolved and instructing plaintiffs that their claim for retroactive monetary relief would not mature until their administrative tax refund claims were finally resolved. *Hogan v. Musolf*, 163 Wis. 2d 1, 471 N.W.2d 216, 218, 222 (1991). Since the § 1983 claim was dismissed in its entirety, there is no "final unappealed judicial determination" of any kind as claimed in the petition at 17.[1]

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[1]The petition is rife with assertions,distortions, inaccuracies and accusations not supported by the record. For example,the record does not even contain any *allegation* of "an unlawful scheme to mislead the members of the petitioners' class for the purpose of extinguishing as many claims as possible." (Petition at 21-22 n.30.)

ARGUMENT

I. THE WISCONSIN SUPREME COURT'S DECISION IS NOT IN CONFLICT WITH DECISIONS OF THIS COURT.

A. No Decision Of This Court Has Determined That A Sovereign State May Not Impose A Requirement Of Prior Resort In Connection With § 1983 Actions Which Challenge The Administration Of State Taxing Statutes.

Congress' purpose in enacting § 1983 was to create a federal forum when no state forum was available. It did not intend to compel any state to create a forum to hear federal claims where no comparable federal forum is available to hear those same federal claims. True, states may not create substantive immunities "from federal liability by relying upon their own common law heritage." *Howlett By And Through Howlett v. Rose*, 110 S. Ct. 2430, 2447 (1990). No court may create substantive immunities, *Tower v. Glover*, 467 U.S. 914, 923 (1984), but states "have great latitude to establish the structure and jurisdiction of their own courts." *Howlett*, 110 S. Ct. at 2441. Thus, there is no "requirement that the State create a court competent to hear the case in which the federal claim is presented." *Id.*, 110 S. Ct. at 2441. *Howlett* itself therefore rejects "[t]he anomaly . . . that a State might be forced to entertain in its own courts suits from which it was immune in federal court . . . ." *Id.*, 110 S. Ct. at 2437.

Felder v. Casey, 487 U.S. 131, 108 S. Ct. 2302 (1988), reinforces the proposition that a state is not required to open its courthouse doors when the federal courthouse doors are closed. Even after *Felder*, a state generally remains free to impose a neutral procedural or jurisdictional rule that may bar the assertion of federal claims. *See State of Missouri v. Mayfield*, 340 U.S. 1, 3

(1950). Such a rule may no longer be applied in a § 1983 action in state court only if it "predictably alters the outcome of § 1983 claims *depending solely on whether they are brought in state or federal court within the same state* [and] is obviously inconsistent with this federal interest in *intra-State uniformity*." *Felder*, 108 S. Ct. at 2314 (emphasis supplied). Since federal courts do not entertain tax-related § 1983 claims, *Felder* does not bar the neutral procedural rule of prior resort established by Wisconsin's Legislature. If anything, the overriding policy considerations in support of intra-state uniformity expressed by the Court in that case *encourage* the establishment of such a neutral procedural rule.

Patsy v. Board of Regents, 457 U.S. 496 (1982) and the other decisions of this Court cited by petitioners do not involve neutral procedural rules which foster the principle of intra-state uniformity, nor do they deal at all with a long line of cases culminating in *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100 (1981), which establish the federal courts' obligation to refrain from interfering with state revenue collection activities.

In *McNary*, the Court did not rely upon the Anti-Injunction Act. It held that, under principles of comity and judicial restraint, it would not entertain a § 1983 damage action challenging the constitutionality of state tax assessments. The Court emphasized that it had consistently held, in a long line of cases antedating the passage of the Act, that judicial interference with a state's budgetary, revenue-raising and collection activities would be devastating. *See Tully v. Griffin, Inc.*, 429 U.S. 68, 73 (1976) (collecting cases). To cite but one example, in *First Nat. Bank v. Board of Com'rs*, 264 U.S. 450, 456 (1924), the Court dismissed a damage action claiming that certain state taxes had been levied in violation of the Constitution: "Plaintiff not having availed itself of . . . [its] administrative remedies . . . it results that the question whether the tax is vulnerable to the challenge in respect to its validity upon any or all of the grounds asserted is one

which we are not called upon to consider." The rationale underlying the equitable principles espoused in these cases has been summarized in the following fashion:

> [S]tate tax administration might be thrown into disarray, and taxpayers might escape the ordinary procedural requirements imposed by state law. During the pendency of the federal suit the collection of revenue under the challenged law might be obstructed, with consequent damage to the State's budget, and perhaps a shift to the State of the risk of taxpayer insolvency.

Perez v. Ledesma, 401 U.S. 82, 128 n.17 (1971) (Brennan, J., concurring in part and dissenting in part).

These considerations remain exactly the same when a § 1983 action is brought in state court. It makes no difference "whether a state court or federal court entertains a sec 1983 claim without requiring the plaintiffs to resort to the state's administrative procedures." *Hogan*, 471 N.W.2d at 223. Petitioners now claim that Congress, which has codified the doctrine described in *McNary* in the Anti-Injunction Act, has inexplicably required state courts to entertain legal proceedings which are diametrically opposed to the principle of non-interference in state revenue matters embodied in that very act. The sheer incongruity of that proposition belies its validity.

Petitioners would have the Court believe that the fundamental principles so clearly defined in *McNary* are no longer good law. No decision of this Court stands for such a far-reaching proposition.

B. Petitioners Failed To Meet Their Burden Of Proving The Inadequacy Or Futility Of Wisconsin's Administrative Remedies.

Petitioners seemingly suggest that this Court's decisions stand for the proposition that, as a matter of *federal* law, resort to a state administrative agency is always futile or inadequate whenever any claim is made that a state statute is preempted by a federal statute. To establish this point, petitioners then cite various *state* decisions concerning the statutory authority possessed by Wisconsin's administrative agencies.

As to futility, an independent and adequate state ground for the decision below is that "the Department and Commission have the authority to determine whether the continued application of the Wisconsin taxing scheme . . . violates federal law or the constitution." *Hogan*, 471 N.W.2d at 224. Moreover, even where a state chooses to employ an administrative agency as the initial decision-maker, "the State's trial-and-appeals process is treated as a unitary system, and for a federal court to disrupt its integrity by intervening in mid-process would demonstrate a lack of respect for the State as sovereign." *New Orleans Public Serv. v. Council of New Orleans*, 491 U.S. 350, 109 S. Ct. 2506, 2518 (1989). The remedies offered by Wisconsin are also far superior to those upheld in *Rosewell v. LaSalle Nat. Bank*, 450 U.S. 503, 507-08 (1981), where the taxpayer alleged that she had been unable to obtain any relief before the administrative agency in the past, yet the Court held that the availability of subsequent judicial review to cure any defects in the administrative process was sufficient to require that such a process be followed.

As to adequacy, the administrative procedure in *Rosewell* required that the tax be paid and provided for no interest on a successful refund claim. Section 71.82(1)(b), Wis. Stats. (1989-90), provides for interest at the rate of nine percent in the event the tax has been paid. In

Rosewell, 450 U.S. at 514–15, the Court held that a state's remedy is adequate if a taxpayer receives a full administrative hearing and any constitutional claims asserted can be resolved upon subsequent judicial review. Similarly, in *California v. Grace Brethren Church*, 457 U.S. 393, 413 n.30 (1982), the fact that the state administrative agency lacked authority to determine the constitutionality of state statutes did not render that remedy inadequate, since state procedures provided for a full hearing and subsequent judicial review.

This case does not even present a pure question of law. Petitioners' suggestion that factual development concerning their refund claims is unnecessary because prospectivity is the only doctrine that would bar such claims is incorrect. Wisconsin's statutory scheme is unique. Wisconsin never did extend a tax exemption to the majority of its state and local retirees. Exemptions were extended only to teachers and to employes of certain governmental units in Milwaukee County. The exemptions were eliminated effective January 1, 1964, with a grandfather clause for those individuals. Even assuming that prospectivity is not a viable defense to the assertion of petitioners' retroactive refund claims, the Wisconsin Tax Appeals Commission has yet to determine the extent of any "discriminat[ion]" under 4 U.S.C. § 111. If discrimination is found to exist, that body will need to determine which federal retirees are entitled to refunds and how such refunds will be computed. To do so, it will need to consider such factors as residency, the existence of predecessor retirement systems, occupation, geographic location while employed and the tax benefit received by the limited group of state and local retirees who were able to claim the exemption. These are precisely the kinds of factual issues that administrative agencies were designed to resolve.

Petitioners make no reference to the unique character of the statute, which requires the resolution of factual claims. They apparently believe that a simple allegation that administrative remedies are inadequate or

futile is sufficient to bypass established administrative procedures. Since they have not even attempted any meaningful demonstration of such inadequacy or futility, that claim should be rejected out of hand.

C. No Decision Of This Court Establishes That The Wisconsin Supreme Court's Decision Denies Petitioners Due Process Of Law.

Petitioners claim that "various situations have been identified in which experience teaches that the probability of actual bias on the part of the judge or decision-maker is too high to be constitutionally tolerable." *Withrow v. Larkin*, 421 U.S. 35, 47 (1975).

This is not one of them. Both Secretary Bugher and Chairman Musolf are indemnified from personal liability under sec. 895.46(1)(a), Wis. Stats. (1989-90). Nor is it true, as claimed in the petition at 22-23 n.31, that "each level of the administrative remedy to which the petitioners have been relegated by the decision below" is "control[led] and direct[ed]" by these two individuals. Section 71.75(7), Wis. Stats. (1989-90), provides that all refund claims not acted upon by the Wisconsin Department of Revenue within one year are deemed granted. Section 71.88(1)(a), Wis. Stats. (1989-90), provides that the Department must act on a petition for redetermination within six months unless an extension agreement is signed, as almost every *Davis*-related claimant has chosen to do. Moreover, Chairman Musolf has recused himself from all *Davis*-related proceedings and therefore is not involved in scheduling or resolving those claims at all (A-1).

Reduced to its essence, petitioners' claim is that the prescribed, exclusive administrative procedure may be avoided simply by suing a decision-maker who is a part of the administrative process. The absurdity of that position tellingly reveals the desperate nature of petitioners' plea to this Court.

D. The Decision Of The Wisconsin Supreme Court Is Not In Conflict With This Court's Decisions Permitting The Assertion Of Claims For Prospective Declaratory Or Injunctive Relief Against Individual State Officials In Actions That Do Not Challenge The Administration Of State Taxing Statutes.

Petitioners cite *Ex parte Young*, 209 U.S. 123 (1908) and *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 109 S. Ct. 2304 (1989) in an effort to establish that they possess viable claims for prospective declaratory and injunctive relief against individual state officials under § 1983. Neither case even purports to address the principles of federalism in the form of deference to state tax administration which were articulated in *McNary*. And, since the statute has been amended, no meaningful claim for prospective declaratory or injunctive relief remains. *See Collins v. Waldron, et al.*, 259 Ga. 582, 385 S.E.2d 74, 75 n.1 (1989).

Contrary to the suggestion in the petition at 7 n.5, the only relevance of *Will* is to petitioners' § 1983 "damage" claims. The Wisconsin Supreme Court recognized that "the damages claimed against the defendants in their individual capacities are essentially a refund claim under a different name." *Hogan*, 471 N.W.2d at 224. *Edelman v. Jordan*, 415 U.S. 651 (1974), stands for the proposition that state officials act in their official capacity and therefore are immune from damages under the Eleventh Amendment unless they "commit torts or other wrongs against the plaintiffs independent of their implementation of state law." *Watkins v. Blinzinger*, 789 F.2d 474, 483 (7th Cir. 1986), *cert. den.*, 481 U.S. 1038 (1987). Under *Will*, 109 S. Ct. at 2311, the sovereign immunity analog to the Eleventh Amendment therefore bars petitioners' § 1983 damage claims brought in state court. Even if petitioners' complaint did state a claim upon which relief in the form

of damages could otherwise be granted against the defendants in their individual capacities, the only reported appellate court decision examining the question indicates that such a claim would not survive the assertion of a qualified immunity defense. *Swanson v. Powers*, 937 F.2d 965 (4th Cir. 1991).

In light of the amendment of the statute, the gravamen of plaintiffs' § 1983 claim is for damages. It would be a meaningless exercise for the Court to consider resuscitating that claim, since it would subsequently have to be dismissed by the Wisconsin courts on sovereign or qualified immunity grounds.

II. THERE IS NO CONFLICT BETWEEN THE DECISION OF THE WISCONSIN SUPREME COURT AND THE DECISIONS OF OTHER STATE COURTS OF LAST RESORT.

Petitioners claim that decisions from state courts in seven jurisdictions are inconsistent with the decision of the Wisconsin Supreme Court.[2] That court held that a state *may* impose a requirement of prior resort in connection with tax-related § 1983 challenges and that, in light of the Court's decision in *Davis*, the Department and the Commission could grant refunds if they choose to do so.

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[2]*American Trucking v. Secretary of State*, 595 A.2d 1014 (Me. 1991); *Burrell v. Mississippi State Tax Com'n*, 536 So. 2d 848 (Miss. 1988); *Marx v. Truck Renting & Leasing Ass'n*, 520 So. 2d 1333 (Miss. 1987); *Allison v. Johnson Cty. Bd. of Cty. Com'rs*, 241 Kan. 266, 737 P.2d 6 (1987); *Arkansas Writers' Project, Inc. v. Ragland*, 293 Ark. 395, 738 S.W.2d 402 (1987); *Beverly Bank v. Board of Review of Will Cty.*, 117 Ill. App. 3d 656, 453 N.E.2d 96 (1983), *cert. den.*, 466 U.S. 951 (1984); *Bung's Bar & Grille, Inc. v. Florence Tp.*, 206 N.J. Super. 432, 502 A.2d 1198 (1985); *Porter v. Treasurer and Collector, Etc.*, 385 Mass. 335, 431 N.E.2d 934 (1982).

The Wisconsin Supreme Court did not hold that a state *must* impose a requirement of prior resort.

The New Jersey and Illinois decisions are not from state courts of last resort. The latter is undermined by a subsequent decision of the same intermediate appellate court, and the issue involved in this case was never resolved as the result of an express concession by the county taxing agency. *Beverly Bank*, 453 N.E.2d at 99. *Compare Raschke v. Blancher*, 141 Ill. App. 3d 813, 491 N.E.2d 1171 (1986).

There is no suggestion in the Maine, Arkansas and Massachusetts decisions that any requirement of prior resort was asserted to be applicable to tax-related cases. *American Trucking*, 595 A.2d at 1018; *Ragland*, 738 S.W.2d at 403; *Porter*, 431 N.E.2d at 936-37. And, unlike this case, the refund remedy in *Allison*, 737 P.2d at 12, was determined to be inadequate because the assessment procedure followed by the local taxing authority "effectively creat[ed] a lien on . . . their land. The administrative procedure as it existed did not prevent an unconstitutional taking." Finally, the Mississippi decisions refusing to dismiss § 1983 claims for injunctive relief result from the existence of a state statute expressly *permitting* claims for injunctive relief in tax-related cases where a challenge is made to the facial constitutionality of a statute. *Marx*, 520 So. 2d at 1339. Wisconsin's statute expressly bars all claims for injunctive relief in tax-related cases. *Hogan*, 471 N.W.2d at 225. *See Metzger v. Department of Taxation*, 35 Wis. 2d 119, 128-29, 150 N.W.2d 431 (1967).

The decision below is consistent with that of the only other state court of last resort that squarely addresses all of the issues the Wisconsin Supreme Court resolved. *Nutbrown v. Munn*, 311 Or. 328, 811 P.2d 131 (1991), *cert. filed*, No. 91-457 (September 17, 1991). Denial of certiorari in both cases will therefore further enhance the existing consistency in the decisions of state courts of last resort.

CONCLUSION

The petition for a writ of certiorari to the Supreme Court of Wisconsin should be denied.

Dated this 5th day of December, 1991.

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State of Wisconsin\Tax Appeals Commission

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MEMORANDUM

September 26, 1991

TO: Commissioners Timken, Junceau and Bartley

FROM: Mark E. Musolf, Commission Chairperson

RE: Recusation from Hogan et al v. Musolf et al;
Tax Appeals Commission
Docket No. 91-I-386

Inasmuch as I am a named defendant in the underlying case which precipitated the petition for review herein, which was filed on September 24, 1991, I hereby remove myself from any participation or involvement in this matter now before the Commission.

pc: Attorney Kevin B. Cronin
Wisconsin Department of Revenue

Attorney Eugene O. Duffy
O'Neil, Cannon & Hollman, S.C.